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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 25 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a principal engineer and research scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal counsel submits a brief and resubmits all of the evidence submitted in response to the director's request for additional evidence. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Civil Engineering from the University of Akron. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. Thus, whether or not the petitioner may also be eligible as an alien of exceptional ability pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii) is moot. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Commr. 1998)(hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, engineering, and that the proposed benefits of his work, more efficient and safer traffic flow, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

While the petitioner has submitted some evidence relating to the regulatory criteria for aliens of exceptional ability, such as professional memberships pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(E), the exceptional ability classification normally requires an alien employment certification approved by the Department of Labor. Section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A). Thus, meeting one of the regulatory criterion for that classification, or even the requisite three criteria, cannot serve to

establish that a waiver of the alien employment certification requirement is in the national interest. *NYSDOT,* 22 I&N Dec. at 222.

In addition, we acknowledge that counsel initially asserted that the petitioner's employer would be unable to secure an alien employment certification through the Department of Labor and, thus, would need to settle for a less experienced and talented employee. We note, however, that on January 10, 2007, the petitioner's employer filed a form I-140 petition in the petitioner's behalf, receipt number SRC-07-069-52240, supported by an approved alien employment certification. The director, Texas Service Center approved that petition on June 26, 2007. Thus, we note that the petitioner has already obtained the benefit from which he seeks a waiver in the matter before us.

Moreover, while the petitioner has submitted significant documentation regarding the use of the traffic hardware and software developed by the petitioner's employer and its importance (much of it predating the petitioner's employment with that company), eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra element of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner received his Master's degree in Management Engineering in 1996 from Southwest Jiaotong University in China. He then worked as a researcher and lecturer at that university through June 2000. As stated above, the petitioner received his Ph.D. in Civil Engineering from the University of Akron in 2003. According to his curriculum vitae, he subsequently began working as a principal engineer and research scientist for Traffic Control Products, Inc. and Wapiti Micro Systems Corp., which operate from the same address and share a facsimile number. The petitioner relies primarily on letters, five published articles, manuscripts that purport to have been presented at conferences but bear no indicia of publication in proceedings, internal reports, evidence that the petitioner has worked on projects funded by the Ohio Department of Transportation and the U.S. Department of Transportation and evidence that the petitioner works for a company whose products were already in use in many states prior to the petitioner's employment.

In her initial cover letter, counsel asserts that, in China, the petitioner was responsible for the implementation and design of the Computer Aided Train Diagram System (CATDS), a national project, which "has been widely used in China to make train programs more efficient and economical." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The record lacks evidence of the petitioner's contributions to this project and its use in China. While the petitioner has submitted evidence that two of his articles published in China have been cited a total of three times, this citation record does not indicate that his articles had a major impact in China.

[redacted], the petitioner's Ph.D. advisor at the University of Akron, praises the petitioner's ability to learn in different disciplines, his ability to acquire a Ph.D. in three years, his creativity and his practical experience. [redacted] discusses the petitioner's research on managing special events, occurrences other than construction that restrict roadway capacity. [redacted] explains that special events range from terrorist attacks to sports events and require appropriate techniques and management to maintain security and safety, ease traffic congestion and pollution, and reduce economic losses. [redacted] states that the petitioner developed a model to estimate traffic impact during special events and successfully used his model to estimate spatial and temporal factors using field data on I-85 near the Georgia Dome in Atlanta, Georgia and other places. [redacted] concludes: "With further improvement, the modeling approach could be enhanced and extended for disaster evacuation planning and management in case of terrorism attack or other types of emergencies." [redacted] asserts that the significance of this work is apparent from the publication of three articles and pending publication of two additional articles. We will not presume, however, the significance of a given article from its publication. Rather, it is the petitioner's burden to demonstrate the impact of the article through objective documentation, such as evidence that the article is well cited or otherwise noted in the trade literature.

[redacted] also discusses the petitioner's participation in the development of the Smart Sign Ordering System (SSOS), an online traffic sign ordering and management system for the Ohio Department of Transportation. While [redacted] praises the new system, he does not explain how it constitutes a significant improvement in civil engineering, the petitioner's field. In a subsequent letter [redacted] asserts that the petitioner "was the first to establish a practical mathematical model to evaluate potential traffic impact prior to a special event, and to date nobody has come up with a better method/problem solving approach." [redacted] explains that the manuscript reporting this methodology "is currently in preparation pending further field testing." Thus, it would appear that, at best, the petition was filed prematurely, before the petitioner's methods had been disseminated in the field through publication or another manner and had demonstrably impacted the field, as might be apparent through objective evidence such as citations.

[redacted], a member of the petitioner's thesis committee at the University of Akron, provides similar information. He further asserts that he became involved in the petitioner's thesis "through discussions to improve the process of solving the resulting equations to obtain the spatial and temporal factors through an optimization technique." [redacted] notes that "a fairly obscure hundred year old

theorem, the so-called Perron-Frobenius theory, provides a highly efficient method for the optimization process." [redacted] does not credit the petitioner with discovering the theorem or its usefulness, but simply asserts that the petitioner "understood the theorem, and was able to implement the solution algorithm without *further* help." (Emphasis added.) In conclusion, [redacted] speculates that the petitioner's model "has the strong possibility of leading to profound, fundamental changes in the way traffic congestion is handled."

The petitioner also submitted a letter from [redacted], Director of the Civil and Environmental Engineering Department at the University of Wisconsin at Madison, an institution with which [redacted] indicates that he collaborates. [redacted] asserts that he met the petitioner in 2000 at "our joint project meeting" and that he has cooperated with the petitioner since that time. [redacted] explains that the petitioner developed a method to calculate travel time reliability, First Order Reliability Methods (FORM) and that the petitioner then developed a Special Event Assessment Package, which is a Geographical Information System (GIS) application. [redacted] asserts that this application "is capable" of being applied in 101 cities, including Washington D.C., but does not assert how many cities have actually adopted this application. [redacted] states that the petitioner's research was "quickly put into industrial practice. TrafficCast Inc. revised [the petitioner's] model and GIS package to generate route-specific real-time and predictive traveler information for the entire United States." The record contains no confirmation of this claim from TrafficCast, Inc. or a copyright or other document crediting the petitioner with the package distributed by TrafficCast. The record also does not resolve how much TrafficCast "revised" the petitioner's original design. The petitioner submits a similar letter from Dr. [redacted] a professor at the University of California, Davis, another institution that [redacted] identifies as a collaborating institution. While [redacted] praises the petitioner's model as unique and having direct applications for transportation management, he does not identify any area that has adopted the petitioner's model.

[redacted], Vice President of Wapiti Micro Systems Corp. and President of Traffic Control Products, explains that the 170 controller is the microprocessor that runs traffic control software and asserts that Wapiti's controller software has "dominated the 170 controller market as the operating software of choice." [redacted] explains that the petitioner and another individual "will be" responsible for all of the upgrades and modifications to the Wapiti software line. The petitioner, however, "is currently the only person who is doing technical support and software development for us, making him an integral asset for our company as well as for all government transportation agencies at the municipal and state levels using our Wapiti control systems." [redacted] credits the petitioner with 100 new cities using Wapiti products and the upgrade of thousands of intersections. [redacted] notes that the petitioner is a representative on the Advanced Transportation Controller (ATC) Joint Committee, a multi-agency organization that is developing new industry-wide standards regarding traffic control firmware and software.

The petitioner has submitted letters from three Wapiti customers, only one of which is on official letterhead. [redacted], a traffic engineering supervisor for the Denver Regional Council of Governments, asserts that many Colorado cities and counties use Wapiti's W4IKS, which the petitioner

is currently responsible for developing. We note that the record contains an invoice for the sale of the W4IKS software program by Wapiti, then located in Dallas, Oregon, to Traffic Signal Controls in Longmont, Colorado, which is just north of Denver, in 1987, long before the petitioner was associated with Wapiti. [redacted] notes the widespread use of W4IKS and its importance to traffic and asserts that it is "important to keep a talent such as [the petitioner] to work on our traffic control systems which are so important to our citizen's [sic] everyday life as well as our country's economy and security." Mr. [redacted] does not explain, however, why the petitioner's skills and experience could not be enumerated on an application for alien employment certification. As stated above, the petitioner is the beneficiary of an approved petition supported by an approved alien employment certification.

[redacted], a traffic systems control specialist with the Pennsylvania Department of Transportation, District 11, Pittsburgh, notes that Pittsburgh uses Wapiti Bridge software designed exclusively for the changeable lane control system of two bridges in Pittsburgh. He asserts that no other software will operate with the same efficiency. He does not assert when the City of Pittsburgh acquired this software. The Transit Signal Priority Handbook contained in the record reflects that Pittsburgh implemented its Transit Signal Priority program using Wapiti software in the "Mid-1990's – early 2000's." More specific to the petitioner, [redacted] asserts that the petitioner developed a "sliding permissive-window for traffic flow coordination by incorporating the actuated traffic control" and is focusing on a system for public transit systems that does not appear to have been implemented yet. Notably, the transit handbook referenced above and dated May 2005 (only five months before the filing date in this matter) indicates that the Bus Rapid Transit component is a "next step." Similarly, [redacted] discusses the petitioner's pending efforts on TrafficView32, a user-friendly central management application. The record contains an October 1, 2004 issue of the *Wapiti Whistler*, promoting TrafficView32. The record does not establish that the petitioner, in his four months of employment at Wapati prior to October 1, 2004, played a critical role in the initial development of TrafficView32. While [redacted] asserts that the petitioner is the only person capable of continuing these projects, that assertion by itself is not a basis for waiving the alien employment certification. *See generally NYSDOT*, 22 I&N Dec. at 218.

Finally, [redacted] a senior traffic signal technician for the City of Portland, provides a letter on the official letterhead of the Portland Office of Transportation. The transit handbook discussed above reflects that Portland implemented its Transit Signal Priority program using Wapati software in 2002, two years before the petitioner began working at Wapati. [redacted] asserts that he met the petitioner in 2005 at a technical meeting in Oregon and has kept in touch with him since that time. [redacted] discusses the petitioner's improvements to "Yellow Trap" control by making it easier to program. Mr. [redacted] identifies three jurisdictions in Oregon that have adopted the W4 software with the petitioner's feature. The record contains a 2003 report by the National cooperative Highway Research Program (NCHRP) on the evaluation of traffic signal displays for protected/permissive left-turn control. The report recommends the flashing yellow arrow instead of a green circle and discusses, on page 61, feedback from the use of Wapiti W4IKS firmware in Jackson County, Oregon, Woodburn, Oregon and Beaverton, Oregon. The petitioner also submitted Internet materials on the implementation revealing that the flashing yellow arrow was implemented in the Oregon areas in 2001 and 2002. Significantly,

the petitioner did not start working at Wapiti until 2004. While [redacted] discusses the petitioner's current projects, it is not clear that the petitioner had completed those projects as of the date of filing.

The petitioner also submits two letters regarding his participation with the ATC Joint Committee. [redacted], chairman of the committee overseeing three working groups, asserts that the petitioner is a key contributor to the area of ATC Controller and ATC Application Programming Interface (API) standards. [redacted] explains that the petitioner's contributions enabled the committee to define generic "Open Systems" that guard against premature obsolescence due to the expiration of one company's line of products. [redacted] does not indicate the number of engineers on the committee and the record does not contain published ATC standards credited to the petitioner. Finally, [redacted] Chair of the ATC API working group, asserts that Wapiti's participation in the group is essential because Wapiti is one of only two companies providing software and firmware for Model 170 controllers. [redacted] further asserts that the petitioner is "responsible for integrating Wapiti firmware onto this new ATC platform, and for developing migration paths from existing technologies to ATC technologies." Mr. [redacted] concludes that the petitioner's input "will" be extremely important and that his "strong background" in the field and research talents have enabled him to "integrate advanced traffic control technologies into state-of-the-art Wapiti Micro System within a short time of period [sic]."

It is inherent to the field of engineering to design improved technology. Not every engineer that contributes to the steady stream of technological improvements occurring constantly in the field warrants a waiver of the alien employment certification in the national interest. As stated above, whether a specific innovation serves the national interest must be decided on a case-by-case basis. *NYSDOT,* 22 I&N Dec. at 221, n. 7. Moreover, as also stated above, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Ultimately, the petitioner relies on his special event models, which had yet to be published and disseminated in the field at the time of filing, and his work on programs that were already widely used in the field prior to his employment for the designing company. While the witnesses have remarked on the petitioner's skill in designing models and improving existing programs, the petition was, at best, filed prematurely, before the impact of the petitioner's work could be gauged.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.